Supreme Court, U.S.
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No. 05-110

IN THE

United States Supreme Court

JOSEPHINE TUSANEZA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals appears in Westlaw as 116 Fed. Appx. 304, 2004 WL 2634482 (2nd Cir. 2004), and in the Appendix as 1a-5a.[1] In that Order, the Second Circuit affirmed the judgment of the United States District Court, Southern District of New York, entered on December 8, 2003, convicting her, after a jury trial, of conspiracy to commit money laundering (18 U.S.C. § 1956(h)) and one substantive count of money laundering (18 U.S.C. § 1956(a)(3)(b)), and sentencing her to a term of twenty-four months of imprisonment.

In that Order, the Second Circuit rejected Petitioner's argument that the evidence was legally insufficient insofar as it relied upon a novel, unwarranted application of the money laundering statute. Among other things, Petitioner had maintained that, rather than allege she had concealed the source of criminal proceeds in a financial transaction, the government had merely alleged that she had concealed the secret use of criminal proceeds to guarantee *other* property that was involved in the financial transaction. The Second Circuit did not directly address this argument.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The Order of the Court of Appeals sought to be reviewed was filed on November 19, 2004. A petition for rehearing was denied on March 9, 2005. Accordingly, this

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[1] Numbers preceded by "A" are references to the Appendix submitted to the Second Circuit.

Petition for a Writ of Certiorari is timely, pursuant to U.S. Sup. Ct. Rule 13, 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

18 U.S.C. § 1956(a)(1):

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –
>
> (B) knowing that the transaction is designed in whole or in part –
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity *** shall be sentenced ****

STATEMENT OF THE CASE

This case raises an important question concerning the scope of the money laundering statute: specifically, whether the money laundering statute is so broad as to include concealment of criminal proceeds that were not actually used in a "financial transaction," but at most were secretly guaranteeing *other* property that was used in such a transaction. Research has not found any other cases where the money laundering statute was ever used in such an expansive, dangerous manner.

The Government's Case

Preliminary events

The government's basic theory was that Petitioner agreed to pledge her property on behalf of Marcos Gonzalez and pose as his friend, so that he could be released on bail in his state prosecution for narcotics offenses. The crux of the money laundering claim was that Petitioner had secretly been paid $250,000 by Gonzalez's brother, Victor, to guarantee her that the property would not be defaulted, with the understanding that her property would be transferred to him after the state court proceedings concluded, thereby deceiving the state court into believing that Petitioner was at risk should the state defendant flee. And although Victor never told Petitioner that the $250,000 represented criminal proceeds, co-conspirators acknowledged in plea allocutions that they suspected that the money resulted from narcotics transactions. Thus, two key issues at trial and on appeal were whether Petitioner knew that the money represented proceeds and, even if she did, whether her conduct amounted to money laundering, since there was no allegation that the property she actually used in the bail proceeding represented criminal proceeds.

The relevant events began in August, 1997, when Marcos Gonzalez (hereinafter "Marcos") was arrested in Westchester County for possession of cocaine. Subsequently, the state court set bail at $250,000. At Marcos' direction, Victor visited certain bail bondsmen, including Danny Gonzalez. T239-40. In his plea allocution, Danny Gonzalez recounted that he advised Victor that he would need more than just a house to collateralize the $250,000. When Danny asked how much money he could raise, Victor said $150,000 at first, and then indicated the entire $250,000, which made Danny suspect that Victor was a drug dealer.

T586. At a later meeting, Danny told Victor that they "needed some kind of property." When Victor said he had no property, Danny told him how to get some property. T241. According to his allocution, Danny also advised Victor how to avoid an inquiry by the court, explaining that he should get five signatures. T586.

Victor searched for someone who was willing to sell their house, while keeping it in their name. This arrangement was necessary, Victor testified, "[b]ecause it wouldn't look right that I showed up with a house that was – that I had just bought. It wouldn't look right, and I couldn't have anything in my name." T243. Eventually, someone referred Victor to Petitioner and her husband Tony, as they reportedly owned a house at 274 Park Hill Avenue. T243.

During their meeting, Victor told Petitioner and Tony that he was there to buy their house, initially without saying anything about a bail package. Victor knew that they had no idea that he was going to propose "any kind of illegal proposition [about] putting up bail." T402. Subsequently, Victor told them that his brother was charged with possession of narcotics, and that he needed them to sign a bail package as a condition to the sale. T402-04.

Victor stated that:

> "her husband did most of the talking and I offered to buy the house, but that I needed for them to sign a bail package. That's the only way that I would be able to buy the house. And they told me that why didn't I just buy it, and then go, take the package myself in my name, the house myself. I told them that I couldn't do that, that it needed to be in their name because it had to be somebody that owned the property for a while.

> We also went over the price. They told me that they wanted $250,000 for the house." T245.

But Victor added, "I didn't tell him it was illegal. I didn't want to scare them. I just told them I needed to buy the house and one of the things I needed for them to do was to sign the bail." (emphasis added). T406. In addition, Victor also admitted that *he did not mention the amount of drugs his brother was alleged to have possessed.* T406.

At a subsequent meeting, Tony told Victor he would do the deal, against his lawyer's advice, because he trusted Victor. T246; 410. Petitioner also mentioned to Victor that there were one or two mortgages on the house, but Victor was not concerned, assuming that the bondsman would check everything out. T411-12. Victor advised them that, since the property was in Petitioner's name, she would have to go to Danny's office and sign paperwork there, and testify for Marcos at the bail hearing. T247, 410. According to Victor, either Petitioner suggested, or the two of them "thought up," that if she had to testify, she would say that she knew Marcos, and was willing to pledge her property as collateral, because he was a tenant in her buildings. T247.

Also testifying for the government was Anthony Briguglio, a real estate and bankruptcy attorney who had represented Petitioner and her husband on prior matters. Briguglio recalled that, sometime in March, 1998, Tony asked him about being able to use property to post a bond for someone. Briguglio observed that any company would perform a title search, which would reveal the property's mortgages. T195-987. Later, Briguglio received a fax, which included a handwritten cover page referring to "Sale 274 Park Hill Ave, Yonkers, NY." Also on that page was a notation indicating that a deed was attached to the fax and

asking Briguglio to contact Danny Gonzalez or Orlando at Associated Bail Services about Marcos Gonzalez. The fax cover page stated that it was from Tony Tusaneza. T179-81. Since he and Tony had not discussed selling the property during their conversation, T182, though, Briguglio had no explanation why the fax referred to a sale.[2] T183. After receiving that fax, Briguglio left a message at Associated Bail Service, but did not hear back. Months later, Tony told Briguglio that the bail company had accepted the 274 Park Hill property as collateral. T191.

The transactions

According to Victor, after one of the prior meetings, he met Petitioner alone and brought her a gym bag containing $250,000. Victor admitted that the money was derived from distributing drugs, though he did not disclose that to her. T249. He testified that:

> "We went over the specifics against about signing over the title, 'cause I didn't want her to sign it over right away. It was going to stay in her name and she was going to pay off the mortgage slowly because she didn't want the government, any problems with the government. And after everything was taken care of and my brother was released, eventually she was going to sign over the house to me." T248, 405-06, 414-17.

Victor understood Petitioner's phrase "problems with the government" was a reference to problems with the IRS arising out of paying the mortgage off right away. T249.

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[2] Petitioner testified that the fax referred to a sale because there was an attachment referring to her own purchase of the property. T686-87.

As part of the arrangement, Victor paid Danny Gonzalez and Orlando Valle $275,000, who in turn assured him that they would not go after the property if Marcos fled. Victor remarked, "I asked them, because I had given Petitioner and her husband my word that nothing was going to happen to their credit or the house." T272; *see also*, T250, 585-86. The total amount Victor was supposed to pay Danny and Orlando was $300,000, representing $250,000 for the house and another $50,000 for Danny. Instead of $300,000, though, Victor only paid $275,000, in several stages. Victor did not pay the full $300,000 because he did not trust Danny and thought he might "try to go after the house anyway once [his] brother left." So, Victor "held back that last 25 just to be able to negotiate with him." T253.

In their allocutions, Gonzalez, Berretta and Orlando Valle all indicated that they "suspected," "believed" or thought that at least some of the money was the proceeds of narcotics transactions. T586, 589, 592. Importantly, however, *Victor never testified that he told Petitioner or her husband that he was paying for her property with proceeds of any illegal activity. Nor did anyone else testify that they advised Petitioner or her husband about the source of the money.*

In any event, after Victor paid the money to them and indicated that he had the property, Daniel Gonzalez, Orlando and Robert Berretta decided to pay $100,000 to International Fidelity, and hold back the other $150,000. T586, 589-90. Thus, by the time he "accepted the house," he had already received $275,000 in proceeds from the illegal transactions to collateralize the bail. Gonzalez admitted that he accepted the house just "to help hide the money." T587-88.

Posting Bail

Thereafter, Petitioner purportedly went to the bail bond company's offices and signed paperwork for the bail application, (including a "confession of judgment") indicating her name, her property and the mortgages thereon. T87, 124-25, 130.

When the bail hearing occurred on March 24, 2001, Petitioner never actually spoke. The hearing commenced with Marcos Gonzalez's defense noting the various family members who were willing to sign confessions of judgment. Ex. 15 p.3. Subsequently, counsel stated that:

> "The only property set forth in the papers which is being offered as security for the bond is a parcel of real estate designated as 270 Park Hill Avenue by a *Josephine Tusaneza, relationship unknown, employment, a real estate agent.* I have reviewed the appraisal documentation which was prepared in anticipation of this application.
>
> "The appraisal of the property is $230,000, an amount which is less than the bond amount. I note in the documentation which was offered by – excuse me, the documentation which is identified as title search, the title report, that there was an outstanding mortgage that was – I don't know if it was obtained in 1992 – for $410,000 ****
>
> "I can't tell from the paperwork whether it was obtained in 1992 and had a $110,000 face value at that time, or currently has a $110,000 face value.
>
> "To any extent, you're looking at a property which has an equity amount of possibly as little as $120,000, probably no more than $140,000.

> "In sum, in looking at what has been offered as property to be secured against the quarter million dollar bond, all of that is offered at face value – face value there is a parcel of real estate which is at best half of the face value on the bond." Ex. 15 pp.5-7. (emphasis added).

After further discussion about the family members' confessions of judgment, counsel added that the bail bond company had approved the sureties and property. The company was reportedly satisfied with the collateral and secure in the $250,000 bond. Ex. 15 p.9. The court then questioned Martin Rochelle, the attorney-in-fact for International Fidelity. Mr. Rochelle essentially confirmed the information proffered by defense counsel. Ex. 15 pp.10-13, noting, *inter alia*, that Petitioner had posted her deed, though the mortgage was estimated to be in the amount of $110,000. Ex. 15 p.14. *No questions were asked, however, about Petitioner's relationship to Marcos, or why she was willing to pledge her property.*

Following other questioning about, *inter alia*, the assets about International Fidelity, the court approved the surety. Ex. 15 p.28. The court then asked Mr. Rochelle whether he swore that "the statements contained in the bail affidavit and bail undertaking [were] true and acknowledge[d] that those are your respective signatures?" When he answered affirmatively, the court declared that the defendant was "bonded out." Ex. 15 pp. 28-29.

Forfeiture of bail and subsequent events

After Marcos' release, Victor said he talked to Petitioner about "not signing over the house, but giving [him] the key and letting [him in]" so that he could "fix it up and rent it." She asked for some time to remove some of her belongings.

T249-51. Sometime in April, Marcos fled the country and went to the Dominican Republic. T252. The bond was ultimately forfeited and International Fidelity paid $250,000 to the Westchester County Clerk. T80.

Thereafter, International Fidelity's attorney, Jerry Watson, met with Berretta, Danny Gonzalez and Orlando to discuss the significant deficit Associated Bail Services now had with International Fidelity. T101-04. When Watson asked specifically about the $150,000 arising from Marcos' flight, Gonzalez said that they had a piece of property, but urged Watson not to make them sell it. When Watson asked why, Gonzalez implied that he was afraid of retribution. T107, 111. Eventually, International Fidelity advised Petitioner of Marcos Gonzalez's flight and threatened to enforce the lien against her property unless they heard from her immediately. Govt. Ex. 27. The deficit from the bail forfeiture was never paid to International Fidelity.[3] T107.

A few months after Marcos fled, sometime in June, Victor Gonzalez was arrested and began to cooperate. T252-54. Thereafter, Victor made tape-recorded conversations with Danny Gonzalez and Orlando Valle, which contained some discussions about the alleged transactions. In one conversation, Victor told Danny Gonzalez that "the lady" had called, saying that they were trying to take her property. Danny remarked that he was still waiting for the rest of the money. Victor noted that there was only another "twenty-five" due, and that he had already given him "two-seventy five." T274-76, Govt Exhibit GA. Similarly, during their conversation, Orlando Valle and Victor discussed how another

[3] In the Rule 29 motion, the defense observed that the attorneys for International Fidelity had sent Defendant a letter dated March 7, 2003, reiterating that she was still responsible for the debt arising out of the forfeiture of bail.

twenty-five was due, that 275 had been paid so far, and how the woman was "scared" because people were bothering her. T274-76, Govt. Ex. 4A.

In addition, within a few months of Victor's arrest, his common-law wife, Bethsabee Martinez Calcagno (hereinafter "Martinez"), who pled guilty to transporting money, also agreed to cooperate by setting up meetings with Petitioner. During unrecorded meetings, Petitioner allegedly remembered all of the details of the deal, indicating that "she was willing to give up the house and to hand in the papers and she was willing to just empty the house." T468. She understood that she was supposed to provide some paperwork, reflecting the status of the mortgage, which was supposed to be paid with the cash Victor had given her. But she supposedly said she could only pay off the mortgage in stages, in order to avoid tax problems. T468.

Defense

Essentially, the defense, as put forth by Petitioner, her daughter Rossanne and Huiranndo Ruizzorrilla, was that she never entered into any secret contract with Victor Gonzalez, let alone received any cash payment from him. Petitioner asserted that she agreed to pledge her property as collateral on the bail bond as a favor to her employee and close friend, Luis Jiminez, who was a superintendent at one of their buildings. T729-735. The defense witnesses all agreed that Jiminez and Petitioner had a very close relationship and had a relationship akin to mother/son. T611-15, 632-40, 673-81.

More specifically, Petitioner testified that Jiminez told her that his friend was "in jail about drugs" and needed property in order to get out of jail. When Jiminez disclosed that $250,000 was at issue, she told him, "I cannot help you

on that because I have a first and a second mortgage," and whatever remained after those mortgages was a relatively small portion. Still, she said was willing to assign her small interest, which was perhaps $10,000 or less. T681, 729-30, 735. Jiminez told her not to worry, since his friend's family was already pledging property, and they were just looking for a secondary property. T682. Petitioner eventually agreed to sign because of her friendship with Jiminez. T690-91.

Motions, Verdict and Sentence

During summations, the government maintained that the state trial court had been misled to believe that the bond had been secured by "legitimate collateral." T794, 924-26. The "whole point" of the "corrupt bail transaction" was purportedly to obtain bail for Marcos Gonzalez. T803. To establish that the co-conspirators knew that the funds in question represented criminal proceeds, the prosecutor emphasized their statements in the allocutions. *See e.g.*, T800, 804, 878. In response, the defense asserted, *inter alia*, that there was no proof that Petitioner had profited in any way from the alleged transaction, and that Victor's testimony that she ever received money was facially incredible. *See e.g.*, T834-35, 855-56. Among other things, defense counsel stressed the absence of evidence that Petitioner ever made any large cash deposit, made any large expenditures or that her lifestyle changed in any way. T834-35.

The jury convicted Petitioner of both counts. T951. Thereafter, the court issued an Order, *sua sponte*, asking both parties to address whether the evidence was sufficient to prove that Petitioner knew that the property involved in the transaction represented criminal proceeds, and whether she knew that the "bail bond scheme" was designed to con-

ceal the source of those funds. March 4, 2003 Order. Following briefing, however, the court denied the Rule 29 motion. Citing the plea allocutions, the court observed that the evidence established the existence of the conspiracy, and that the issue was whether Petitioner was a participant. P.3. Though the court noted that Victor "never explicitly told" Petitioner that the money represented proceeds from narcotics trafficking, the court found that a rational trier of fact could conclude that she had such knowledge, and that the bail bond transaction was designed, in whole or part, to conceal the true nature or origin of the funds. P.4.

On November 24, 2003, the parties appeared for sentencing. Defense counsel emphasized the absence of proof that Petitioner engaged in any scheme for the purpose of legitimizing the proceeds of a crime or that she actually realized any gain. Sent. 6-7. Agreeing that there was no evidence of profit or financial motivation, Sent. 13, 28, the court granted a downward departure for aberrant conduct, and imposed a sentence of twenty-four months. The court also granted bail pending appeal, noting that the Rule 29 issue presented "a substantial question of law." Sent. 34.

Appeal

On appeal, Petitioner raised two arguments. First, she argued that the government failed to present legally sufficient evidence of guilt. In that regard, Petitioner reasoned, *inter alia*, that there was no proof she knew the money she allegedly received constituted criminal proceeds. Further, she argued that, even accepting all the government's allegations as true, they did not amount to money laundering; for the government claimed merely that she had concealed from the state court the use of criminal proceeds to guarantee her

property, rather than claimed that the property actually involved in the bail application constituted criminal proceeds itself. Second, she argued that she was denied a fair trial and her Sixth Amendment right of confrontation by the admission of plea allocutions of alleged co-conspirators, which were instrumental in proving that the money in question represented proceeds of crimes.

The Second Circuit rejected both arguments in a summary order dated November 19, 2004. With regard to the legal sufficiency claim, the panel wrote:

> "Defendant's knowledge of the illegal source of the funds may be established by evidence that defendant was 'willfully blind' to facts before her *** Such 'willful blindness' may be inferred from the presence of a pattern of 'red flags' putting defendant on notice of the illegal source of the funds.
>
> "The evidence sufficed to establish the presence of several such red flags. A very large amount of cash was involved, and the transaction was structured in an unusual way with the clear purpose of hiding the transaction from the state court and obscuring the identity of the property's true owner. Moreover, defendant was aware of information connecting the transaction with the drug trade: that the brother of the party with whom defendant dealt – the person the transaction was plainly designed to benefit – was in jail awaiting trial on serious drug charges" (citations omitted).

Within the requisite time period, Petitioner submitted a Petition for Rehearing to the Second Circuit. In that application, Petitioner mentioned several legal and factual errors made by the panel. For example, Petitioner emphasized that

the panel had relied upon the theory that Petitioner was "willfully blind" to certain facts, even though the prosecutor conceded during oral argument that such theory had not been presented to the jury. Similarly, the panel accepted a different theory than presented to the jury in concluding that Petitioner had sought to conceal the source of the funds, thereby avoiding Petitioner's argument that the type of concealment alleged was actually a type not encompassed by the money laundering statute. And the Petition asserted that the panel had misapplied "plain error" analysis and misconstrued *Crawford v Washington*, in concluding that the error had not affected Defendant's "substantial rights."

The Second Circuit denied the Petition in an Order dated March 9, 2005.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD REVIEW THIS CASE TO RESOLVE WHETHER THE MONEY LAUNDERING STATUTE ENCOMPASSES CONCEALMENT OF THE CRIMINAL SOURCE OF FUNDS, EVEN WHERE THOSE FUNDS WERE NOT ACTUALLY USED IN A FINANCIAL TRANSACTION, BUT MERELY GUARANTEED *OTHER* PROPERTY THAT WAS USED IN A FINANCIAL TRANSACTION

This case involves an apparently unique application of the money laundering statute. The theory of the prosecution at trial was that Petitioner engaged in money laundering by concealing the fact that criminal funds were being used to guarantee the property that she had pledged as collateral in a bail proceeding. Yet, there was no dispute that Petitioner's property itself did not constitute criminal proceeds. Thus, unlike typical money laundering prosecutions where the government alleges an effort to conceal the criminal nature of funds in a financial transaction, here the funds that were supposedly criminal were not even part of the financial transaction. We submit this prosecution represents a dangerous expansion of the money laundering statute, warranting Supreme Court review.

18 U.S.C. § 1956(a)(1)(B)(I) provides, in pertinent part:

> "(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which

> in fact involves the proceeds of specified unlawful activity –
>
> (B) knowing that the transaction is designed in whole or in part –
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity."

Courts have recognized that "the purpose of the money laundering statute is to reach commercial transactions intended (at least in part) to disguise the relationship of the item purchased with the person providing the proceeds." *United States v Sanders*, 928 F.2d 940, 946 (10th Cir.), *cert. denied*, 502 U.S. 845 (1991). In other words, "the statute is aimed at transactions that are engaged in for the *purpose* of concealing assets." *United States v Garcia-Emanuel*, 14 F.3d 1469, 1474 (10th Cir. 1994) (emphasis in original). If, on the other hand, the transactions are engaged in only for "personal benefit, and not to create the appearance of legitimate wealth, they do not violate the money laundering statute." *Id.* To put it differently, the money laundering statute does not prohibit *spending* money illegally obtained, but only *laundering* money illegally obtained. *See e.g., United States v Rockelman*, 49 F.3d 418, 422 (8th Cir. 1995); *United States v Dimeck*, 24 F.3d 1239, 1244 (10th Cir. 1994).

Thus, a prosecution under this section requires the government to prove four elements:

> (1) that the defendant engaged in a financial transaction;

> (2) that the defendant knew that the property involved in the transaction represented the proceeds of unlawful activity;
>
> (3) that the property involved was in fact the proceeds of that criminal enterprise;
>
> (4) that the defendant knew that the transaction was designed to conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds of the specified unlawful activities.

Id; see also, United States v Wynn, 61 F.3d 921, 924 (D.C. Cir. 1995); *United States v Brown*, 944 F.2d 1377, 1387 (7th Cir. 1991). Notably, the statute expressly refers to "property involved in a financial transaction."

In this case, the government's argument at trial was that Petitioner agreed to pledge her property as collateral in connection with the bail proceeding, without disclosing that she had already sold the property, for $250,000 cash, to Victor Gonzalez. And as part of the scheme, she allegedly was prepared to represent to the state court that she was willing to pledge her property because Marcos Gonzalez had been a tenant in one of her buildings. Yet, even if each of these allegations are true, they do not prove the requisite intent to conceal the nature of the property used in the bail proceeding; at most, such allegations show an intent to conceal that *other* funds – not involved in the financial transaction – were used to guarantee such property.

Notably, the record leaves no doubt that the prosecution's theory was that Petitioner used her own, legitimate property in the financial transaction. The indictment alleged that the state court was the party allegedly deceived. *See*, Indict. ¶¶ 10(b) and c. In response to Petitioner's Rule 29 motion, the

government took the same position. See Govt's memo, pp.22-24. In summations, the prosecutor explicitly argued that state court had been misled that "the bond was secured by legitimate collateral," rather than the "secret collateral." T794. Also in summations, the prosecutor stated that, while the bond appeared "on its face" to be secured by certain real estate, "in reality, the cash to be paid by Victor was the security for the insurance bond posted as bail for the Marcos Gonzalez criminal case." T923-24. And at another point, the prosecutor complained that the collateral had not been disclosed to the state judge. T924-25.

Actually, there was scant evidence that Petitioner actually deceived the state court in *any* manner.[4] According to the government's witnesses, Petitioner signed an "Application and Indemnity for Bail Bond," indicating her name, her property and information about two mortgages and the amount of equity remaining, and a "confession of judgment," providing for a contingent liability in the sum of $250,000. These documents basically represent that, if bail was forfeited, then International Fidelity would have the right to look to her property to help satisfy its resultant debt of $250,000.

Yet, *there was nothing false about the representation that Petitioner was pledging the property as collateral.* According to Victor Gonzalez himself, the plan was for Petitioner to retain title until after bail had been posted. Thus, *even under the government's version of facts, the alleged secret sale was not meant to be fully consummated until after Mar-*

[4] Indeed, the curious aspect of the state bail proceedings was that the trial court neglected to make the appropriate inquiries, pursuant to § 520.30 of the New York State Criminal Procedure Law, about the source of the property that was being pledged as security.

cos was released. It follows that, at the time Petitioner signed the documents, the representation she was making was true. And whatever Petitioner and Victor may have allegedly planned in the event that she was called to testify before the state court, the fact is that she never made any statement or representation in open court. In fact, the attorney for Marcos Gonzalez stated, in open court, that the relationship between Petitioner and Marcos was "unknown" and that her property's equity was substantially less than the amount of bail. Ex. 15 pp. 5-7. Bluntly put, the record is devoid of proof that Petitioner perpetrated any actual fraud on the state court.

In any event, the government was not really claiming that Petitioner's representations in the signed documents actually misled the court, or that her planned representations in court would have misled the court, about the fact that she had pledged property; rather, *the government's true premise was that such actual or planned representations misled or would have misled the court into assuming that Petitioner was at a genuine risk by pledging her property, since she had already allegedly received sums that amounted to the value of the property.* But there is no precedent suggesting that concealment of this type of *risk* satisfies the statute's requirement of an intent to conceal "the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity."

While diligent research has not revealed any cases that come even remotely close to this scenario, several general principles are worth noting briefly. In *United States v Garcia-Emanuel*, 14 F.3d 1469, 1475-76 (10th Cir. 1994), the court summarized that:

> "[A] variety of types of evidence have been cited by this and other circuits as supportive of evidence of

> intent to disguise or conceal. They include, among others, statements by a defendant probative of intent to conceal; unusual secrecy surrounding the transaction; structuring the transaction in a way to avoid attention; depositing illegal profits in the bank account of a legitimate business; highly irregular features of the transaction; using third parties to conceal the real owner; a series of unusual financial moves cumulating in the transaction; or expert testimony on practices of criminals."

Still, an intent to disguise cannot be inferred based simply because the items purchased had "investment value" and were purchased with criminal proceeds. *United States v Marshall*, 248 F.3d 525, 539-40 (6th Cir. 2001).

Additionally, courts have recognized that "[s]ometimes one of these red-flag events – cash, concealment, false ownership – can occur even with lawfully derived income." *United States v Rivera-Rodriguez*, 318 F.3d 268, 272 (1st Cir. 2003); *see also, United States v Garcia-Emanuel*, 14 F.3d at 1475, *supra* ("There are many examples of suspicious behavior that we have held will not, standing alone, justify a finding of a design to conceal beyond a reasonable doubt."). Conversely, an intent to conceal or disguise is much more appropriate where the record indicates a combination of "red-flag" or a pattern of events. *Id; see also, United States v Martinez-Medina*, 279 F.3d 105, 115-16 (1st Cir. 2002).

Applying these principles, many courts have not hesitated to reverse where the evidence shows merely that criminal proceeds were spent, rather than concealed. *See e.g., United States v Corchado-Peralta*, 318 F.3d 255, 259 (1st Cir. 2003) ("nothing about purchases pointed toward conceal-

ment or disguise beyond the fact that virtually *all expenditures* transform cash into something else"); *United States v Rockelman*, 49 F.3d 418, *supra* (no attempt to conceal defendant's involvement in real estate transaction); *United States v Heaps*, 39 F.3d 479, 487 (4th Cir. 1994) (though money was clearly derived from criminal proceeds, the wiring of the money to the defendant's wife was for the purpose of convenience and not concealment); *United States v Garcia-Emanuel*, 14 F.3d at 1476, *supra* ("mere fact that defendant made a [mortgage payment] with a cashier's check purchased with drug money is insufficient to sustain a money laundering conviction"); *United States v Sanders*, 928 F.2d at 946, *supra*.

Here, the evidence of an intent to conceal or disguise is even more deficient. For, as already explained, the government *did not really allege an intent to conceal that the property itself represented the proceeds of criminal activities, but rather a mere intent to conceal that the property was, in effect, being guaranteed with proceeds of criminal activities.*

In affirming, the Second Circuit completely disregarded the prosecution's theory. The court discussed reasons why Petitioner should have known that the cash constituted criminal proceeds (relying upon a theory of "willful blindness" that was not even submitted to the jury), without even addressing the crux of Petitioner's point that the property actually involved in the financial transaction was concededly legitimate. Considering that the prosecutor's theory is both unprecedented and dangerously expansive, it was incumbent upon the Second Circuit to consider whether it was truly authorized by the money laundering statute. For the same reasons, this Court should review this case.

CONCLUSION

THE PETITION SHOULD BE GRANTED

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 19th day of November two thousand and four.

PRESENT:

JON O. NEWMAN,
JOSEPH M. McLAUGHLIN,
Senior Circuit Judges,
ROSEMARY S. POOLER,
Circuit Judge,

UNITED STATES OF AMERICA,

Appellee,

-v- (No. 04-0198-cr)

JOSEPHINE TUSANEZA,

Defendant-Appellant.

Appearing for Appellee:
Cynthia K. Dunne, Assistant United States Attorney (David N. Kelley, United States Attorney for the Southern District of New York, Celeste L. Koeleveld, Assistant United States Attorney, Of Counsel, on the brief), New York, NY

Appearing for Defendant-Appellant:
James E. Neuman, Mischel, Neuman & Horn, P.C., New York, NY

Appeal from the United States District Court for the Southern District of New York (Sidney Stein, *J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is AFFIRMED.

Defendant-appellant Josephine Tusaneza appeals from the District Court's judgment, entered December 23, 2003, convicting her, after a jury trial, of one count of money laundering under 18 U.S.C. § 1956(a)(1)(b)(i) and one count of conspiracy to commit money laundering under 18 U.S.C. § 1956(h). We assume the parties' familiarity with the facts, procedural history, and specification of issues on appeal.

On a challenge to the sufficiency of the evidence to support a conviction, we view the evidence in the light most favorable to the Government, drawing all reasonable inferences and credibility assessments in its favor. *United States v. Aulicino*, 44 F.3d 1102, 1114 (2d Cir. 1995). We must affirm "if any rational juror could have found the essential elements of the crime proved beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

It is uncontested that the evidence sufficed to prove that defendant engaged in a financial transaction involving the proceeds of illegal drug trafficking. Defendant's knowledge that the transaction was designed to conceal the illegal source of the funds from the state court may be inferred from defendant's role in facilitating the concealing aspects of the transaction by, for example, purporting to own property she had already sold, and agreeing to lie to the state court.

Defendant's knowledge of the illegal source of the funds may be established by evidence that defendant was "wilfully blind" to facts before her. *United States v. Rivera-Rodriguez*, 318 F.3d 268, 271 (1st Cir. 2003); *United States v. Campbell*, 977 F.2d 854, 859-60 (4th Cir. 1992).

Such "willful blindness" may be inferred from the presence of a pattern of "red flags" putting defendant on notice of the illegal source of the funds. *See Rivera-Rodriguez*, 318 F.3d at 272; *United States v. Garcia-Emanuel*, 14 F.3d 1469, 1475-76 (10th Cir. 1994).

The evidence sufficed to establish the presence of several such red flags. A very large amount of cash was involved, and the transaction was structured in an unusual way with the clear purpose of hiding the transaction from the state court and obscuring the identity of the property's true owner. Moreover, defendant was aware of information connecting the transaction with the drug trade: that the brother of the party with whom defendant dealt – the person the transaction was plainly designed to benefit – was in jail awaiting trial on serious drug charges.

While admission at trial of plea allocutions of defendant's co-conspirators was improper under *Crawford v. Washington*, 124 S. Ct. 1354 (2004), *see United States v. McClain*, 377 F.3d 219 (2d Cir. 2004), defendant is not entitled to a new trial on this basis as the error did not affect her "substantial rights." *See United States v. Keigue*, 318 F.3d 437, 441 (2d Cir. 2003). The District Court allowed use of the allocutions only to prove the existence of the money laundering conspiracy and not to prove defendant's participation or knowledge, and gave a limiting instruction to that effect. Other evidence sufficed to prove the existence of the conspiracy. We presume, absent evidence to the contrary, that jurors abide by a district court's limiting instructions. *See United States v. Downing*, 297 F.3d 52, 59 (2d Cir. 2002). We conclude, therefore, that suppression of the allocutions would likely not have

changed the result of the trial, so that defendant is not entitled to a new trial. *See Keigue*, 318 F.3d at 445.

The mandate in this case will be held pending the Supreme Court's decision in *United States v. Booker*, ____ U.S.____, 2004 WL 1713654 (Aug. 2, 2004) (mem.) (accepting certiorari), and *United States v. Fanfan*, ____ U.S.____, 2004 WL 1713655 (Aug. 2, 2004) (mem.) (accepting certiorari). Should any party believe there is a need for the district court to exercise jurisdiction prior to the Supreme Court's decision, it may file a motion seeking issuance of the mandate in whole or in part. Although any petition for rehearing should be filed in the normal course pursuant to Rule 40 of the Federal Rules of Appellate Procedure, the court will not reconsider those portions of its order that address a defendant's sentence until after the Supreme Court's decision in *Booker* and *Fanfan*. In that regard, the parties will have until 14 days following the Supreme Court's decision to file supplemental petitions for rehearing in light of *Booker* and *Fanfan*.

For the foregoing reasons, the judgment of the District Court is AFFIRMED, and the Clerk is directed to hold the mandate pending the decision in *Booker* and *Fanfan*.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk

BY: Richard Alcantara, Deputy Clerk

DATE: 11/19/04